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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1276.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
THE ALDRED INVESTMENT TRUST ET AL.,
Defendants.

APPLICATION OF J. N. WELCH, A. B. COOK AND LOUIS BERNSTEIN FOR ALLOWANCE OF FEES.

APPLICATION OF GEORGE B. ROWLINGS FOR ALLOWANCE OF FEES.

FRANK BAILEY ET AL.,
Intervenors-Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT ROWLINGS IN OPPOSITION.

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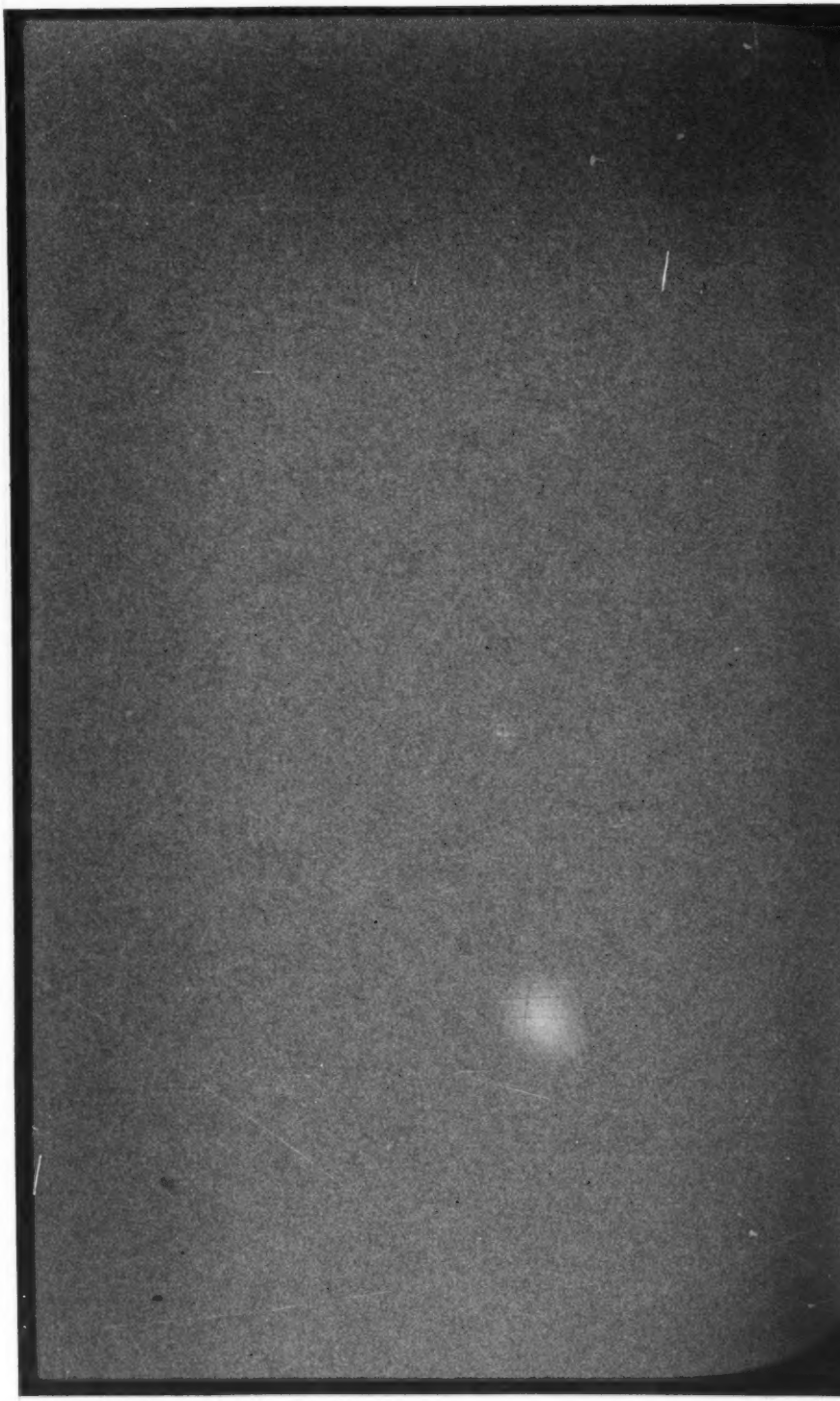

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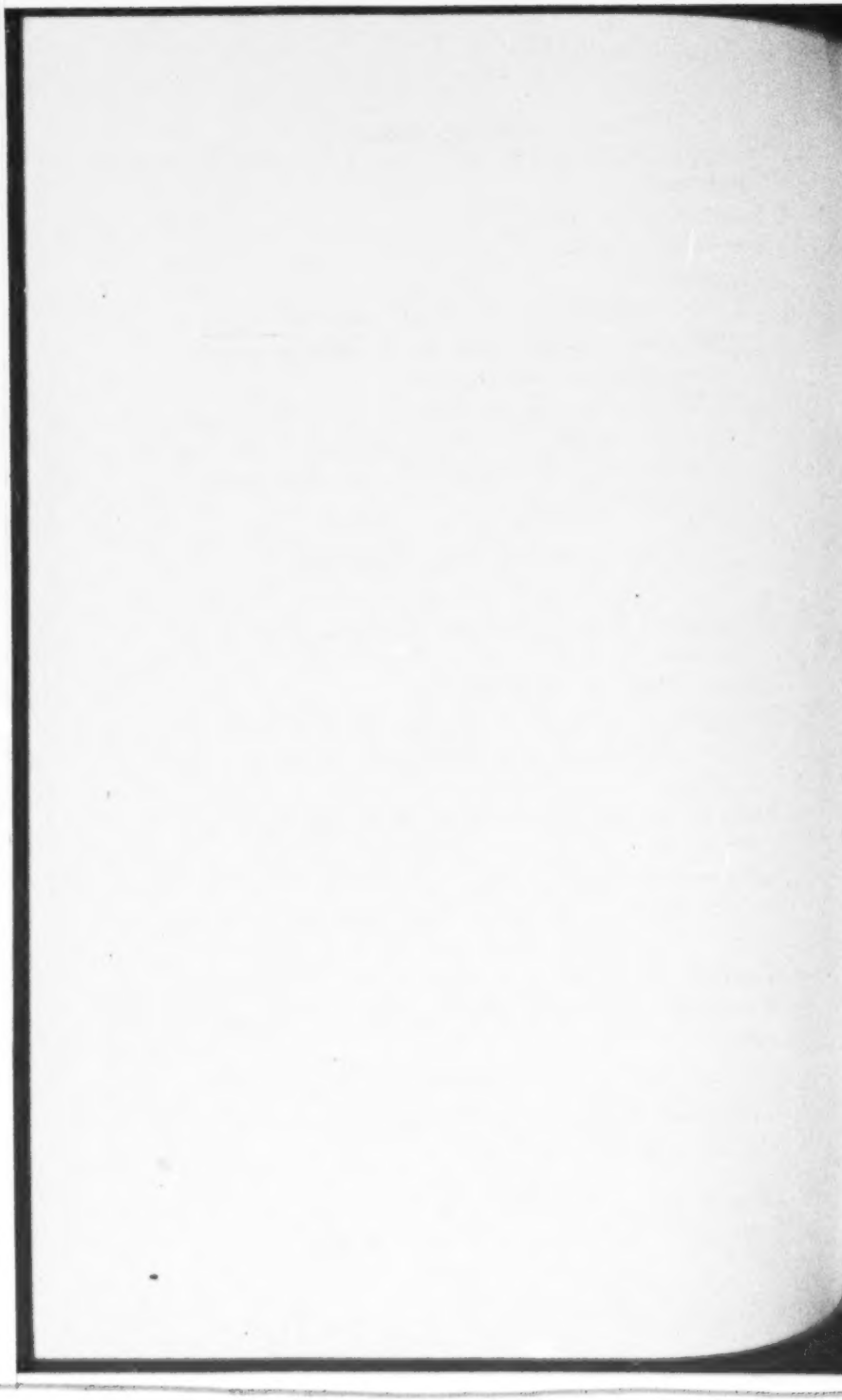

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Opinions Below.

There is no opinion of the District Court for the District of Massachusetts. The opinion of the Circuit Court of Appeals, entered February 24, 1947 (R. 242), is reported in 159 F. (2d) 1014. The petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code.

Question Presented.

The question presented is whether this respondent was properly allowed the sum of $14,000 as compensation for his services as attorney for the Receivers of Fidelity Assurance Association, Intervenors, in the action entitled "*Stratton* v. *Aldred Investment Trust,*" and in the case at bar.

Statement of Facts.

The statement of facts, as set out in the petition, is fragmentary and for that reason misleading. A further and more detailed statement is therefore necessary to a proper understanding of the case. The pertinent facts may be briefly summarized as follows:

The Aldred Investment Trust was a common-law trust organized in 1927 under an agreement and declaration vesting absolute control of the Trust and its assets in its trustees and their successors.

At the time of the litigation hereinafter described the Trust had outstanding in the hands of the public $5,900,000 face amount of debentures, which bore interest at the rate of four and one-half per cent (4½%) per annum, but which did not mature until December 1, 1967. To each

debenture was attached 1 common share (no par value) of the Trust for each $100 principal amount of debenture. The total outstanding amount of such non-detachable shares, therefore, was 59,000. The Trust also had outstanding 112,500 free common shares not attached to any debentures. All common shares, whether attached or free, had equal voting rights share for share (R. 119-120).

In October, 1941, one Hanlon acquired 110,000 of the free common shares of the Trust. This block represented more than sixty per cent (60%) of all the outstanding shares, and although it had no asset value, it constituted voting control of the Trust and gave Hanlon the power to dominate completely the Trust's policy, assets and management. This control he exercised by selecting a group of intimate friends to serve as trustees, who were subject to his wishes and directions, and by managing the assets of the Trust in a manner adverse to the interests of the debenture holders and tending toward dissipation of such assets (R. 122 *et seq.*).

The Receivers of Fidelity Assurance Association, as the holders of $195,000 face amount of said debentures and 1950 attached shares, disturbed by the situation of the Trust, caused an investigation to be made regarding the Trust. Their attorneys in West Virginia, Messrs. Koontz & Koontz, and in New York, Messrs. Swiger, Chambers and Kelley (whose services and disbursements this respondent requested be recognized in the allowance to him (R. 75-76)), made investigations, as a result of which they consulted with the respondent Rowlings with reference to the Receivers' rights as debenture holders to obtain receivership and liquidation of the Trust. Mr. Rowlings conferred with them and rendered an opinion in this respect, following which he prepared to file a complaint for the appointment of receivers. While this was in prepara-

tion he learned that attorneys for one Stratton were about to file a similar petition and he thereupon conferred with them. It was decided that he would work in collaboration with these attorneys in instituting and prosecuting these proceedings, the Fidelity Receivers to come in as intervening parties plaintiff rather than join in the original petition (R. 76).

On March 8, 1944, the Stratton suit was commenced by a complaint praying for the appointment of a receiver to take control of, protect and liquidate the assets of the Trust and distribute the proceeds among its debenture holders and stockholders and that Hanlon and his associates be restrained from managing or directing the business and affairs of the Trust (R. 97, 149).

Mr. Rowlings assisted and participated with the Stratton attorneys in the preparation of this complaint, its filing, issuance of subpoenas in connection therewith and the preliminary hearings relating to the issue as to jurisdiction raised by the defendants (R. 76). On March 15, 1944, he filed a motion on behalf of the Fidelity Receivers to intervene as parties plaintiff (R. 149, 182). After a hearing this motion was denied without prejudice for the sole reason that in the opinion of the District Judge the intervention at that time might complicate the question then pending as to the Court's jurisdiction over the original parties to the action (R. 149, 229). After the Court's decision on the jurisdictional question (R. 150) Mr. Rowlings, on May 16, 1944, again filed a motion for the intervention of the Fidelity Receivers as parties plaintiff (R. 150, 186) and this motion was allowed after hearing on May 24, 1944 (R. 150, 151, 237).

On May 19, 1944, the Securities and Exchange Commission filed a complaint in said District Court against the Aldred Investment Trust and Hanlon and his associates under the Investment Company Act of 1940 for the same

relief prayed for in the Stratton case (R. 2, 11, 118, 152). This case will be hereinafter referred to as the S.E.C. case. While the S.E.C. case was pending the Stratton case was tried on the merits (R. 151, *120-417**) and was taken under advisement on June 20, 1944, and decision on the merits was withheld pending the hearing of the S.E.C. case (R. 118, 151). In the preparation for the trial of the Stratton case (which preparation included the taking of lengthy depositions of many of the defendants) Mr. Rowlings actively assisted the attorneys for Stratton (R. 76-77). In the trial of the Stratton case he also participated, and Mr. Palmer, of the firm of Koontz & Koontz, through whom the case came to Mr. Rowlings, took part in the presentation of evidence (R. *121, 186* to *187, 193* to *197, 200* to *201, 209* to *210, 332* to *334, 389* to *391, 415, 416*).

Early in January, 1945, the S.E.C. case was tried on the merits. At the very outset of that trial counsel presented to the Court a stipulation whereby the entire "transcripts of testimony and depositions taken and the exhibits received in evidence" in the Stratton case were "incorporated" in the S.E.C. case and "added to the testimony presented in the trial of this cause" and further stating that the Stratton record should "be considered as if adduced in this Action" (R. 118, *637-638*).

On January 19, 1945, the District Court rendered its opinion and entered judgment in the S.E.C. case adjudging the officers and trustees of the Trust guilty of misman-

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*Italicized record references are page numbers of the printed record of the S.E.C. case on the first appeal to the Circuit Court of Appeals. Copies of such record may be found with the petition for certiorari filed with this Court under Docket No. 645, October Term, 1945, which petition was denied. Such printed record is properly a part of the record for this petition because it was by stipulation transmitted to the Circuit Court of Appeals in lieu of reproduction thereof as part of printed record on appeal from the allowances here involved (R. 175, 239).

agement and gross abuse of trust, enjoining them from acting as such trustees and officers and appointing receivers for the Trust (R. 118, 151, 156, *96*). In the same opinion the Court stated (R. 137):

> "Civil Action No. 2708; In view of the fact that the relief prayed for in this, the Stratton case, has been fully granted in the S. E. C. case, it seems unnecessary to pass upon the merits of the Stratton case. The bill is therefore ordered dismissed without prejudice and without costs."

The defendants in the S.E.C. case appealed from the judgment of the District Court to the Circuit Court of Appeals for the First Circuit (R. 156, *1085*) and that Court affirmed the judgment (R. 158). Respondent Rowlings, together with the Stratton attorneys, with the permission of the Circuit Court of Appeals, prepared and filed in connection with said appeal a brief as *amici curiae*.* On March 4, 1946, Mr. Rowlings filed a petition in the District Court on behalf of the Fidelity Receivers to intervene in the S.E.C. case (R. 159, 220). This was allowed on May 6, 1946 (R. 221). On March 4, 1946, he filed his petition for allowance of compensation in the S.E.C. case (R. 221). This was heard by the District Court on May 8, 1946 (R. 64 *et seq.*) and an order making an allowance of $14,000 to Mr. Rowlings for services and disbursements was entered May 9, 1946 (R. 223). This order was affirmed by the Circuit Court of Appeals for the First Circuit on February 24, 1947 (R. 242).

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*Copies of this brief were also transmitted by stipulation to the Circuit Court of Appeals as part of the record on appeal from the allowances here involved (R. 68, 176).

Argument.

I.

The Decision of the Circuit Court of Appeals Affirming the Allowance of $14,000 to Respondent Rowlings was Correct.

The governing principle under which Mr. Rowlings was awarded and is entitled to an allowance for services and disbursements in the receivership of Aldred Investment Trust is well established. The leading case in which the principle is stated is *Trustees* v. *Greenough*, 105 U.S. 527, 532-533, where it is stated:

> "It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts."

There can be no doubt that the efforts of Mr. Rowlings and the other counsel for the Fidelity Receivers contributed substantially to the preserving and protecting of the trust estate. This is evident from a consideration of the facts appearing in the record and heretofore briefly recited.

Regardless of whether the Securities and Exchange Commission made its own investigation or whether in the opinion of its attorneys the preparatory work in the Stratton case was of no assistance to them, the fact remains that the Commission accepted as part of its case the rec-

ord in the Stratton case, which action necessarily also accepted the benefit of all investigation, preparation and effort which had gone into producing the Stratton record. It must be presumed that in the judgment of the Commission's attorneys this record furnished them with indispensable evidence for their case. A comparison of the evidence adduced in the Stratton case and in the S.E.C. case with the findings of the District Court will show that many of such findings must have been based on Stratton evidence only and many more on evidence introduced in both cases. The important fact is that the work of the attorneys in the Stratton case and the evidence produced by them not only was incorporated as part of the S.E.C. case but obviously formed a very material element in producing the final result therein.

Although the Stratton case was technically "dismissed," the judge deemed it "unnecessary to pass upon the merits of the Stratton case," because, as he stated, "the relief prayed for in this, the Stratton case, has been fully granted in the S.E.C. case" (R. 137). Thus the Stratton case was not dismissed because the evidence it produced did not justify the relief asked. Nor does such dismissal "without prejudice" indicate that the attorneys for the original and intervening plaintiffs did not contribute substantially to the relief afforded the debenture holders by the result in the S.E.C. case. That the District Judge considered their work of assistance to him in granting the relief prayed for is shown by his memorandum endorsed on a letter to him from one of the Stratton attorneys. The letter (R. 196) expressed the fear of the attorney that the dismissal might be misinterpreted to foreclose allowances to him "and those associated with me in the Stratton case," and he suggested an amendment to the Stratton order to take care of this possibility. The Judge's memorandum states (R. 197):

"I deem it unnecessary to amend opinion. Stratton evidence was incorporated into SEC case and as such I would assume that petitioners may seek allowances for work in Stratton case."

Recognition of the services of Mr. Rowlings and the other attorneys for the Fidelity Receivers should not be refused by reason of the fact that the original suit was not commenced by them, or that the larger portion of the work in prosecuting it was performed by the attorneys for the original plaintiff. They worked with the Stratton attorneys from the very outset and there are no cases which hold that two or more attorneys representing similar interests when working jointly to produce the same result may not be compensated in equity from a fund created, preserved or protected through their joint efforts, even though it may be that the same result might have been obtained through the independent efforts of any one of them. In fact, the authorities are to the contrary. For example, see *Murphy* v. *North American Light & Power Co.* (D.C. S.D. N.Y., June 14, 1940), 33 F. Supp. 567; *Winkelman* v. *General Motors Corporation* (D.C. S.D. N.Y., December 10, 1942), 48 F. Supp. 504; *Crump* v. *Ramish* (C.C.A. 9, November 16, 1936), 86 F. (2d) 362.

It is well settled that in cases of this kind the allowance of attorneys' fees is within the judicial discretion of the trial judge and that in fixing the fee the Court can proceed upon its own knowledge of the efforts expended and the value of the services rendered. *Monaghan* v. *Hill* (C.C.A. 9, January 21, 1944), 140 F. (2d) 31, 34; *United States* v. *Anglin & Stevenson* (C.C.A. 10, October 6, 1944), 145 F. (2d) 622, 630; *Cleveland* v. *Second National Bank & Trust Co.* (C.C.A. 6, May 22, 1945), 149 F. (2d) 466, 470, 471. It

is perfectly clear that it is competent for the judge who presides over the litigation to make allowances to counsel based upon the record of the proceedings, statements of counsel and his own knowledge of the extent of the services rendered. *Sagalyn* v. *Meekins, Packard & Wheat Inc.*, 290 Mass. 434, 440, 441 (1935); *Winkelman* v. *General Motors Corporation* (D.C. S.D. N.Y., December 10, 1942), 48 F. Supp. 504, 507; *City of Wewoka, Okl.*, v. *Banker* (C.C.A. 10, February 5, 1941), 117 F. (2d) 839, 844, 845.

The District Judge who made the allowance to Mr. Rowlings heard the statements of counsel (R. 65 *et seq.*) and no objection was voiced by the petitioners' counsel to this procedure. The same judge had presided at the lengthy hearing of the merits of the Stratton case (R. *120* to *417*), he had before him the extensive depositions taken in the Stratton case (R. *417* to *590*), he heard the motions to intervene on behalf of the Fidelity Receivers (as to which briefs were filed (R. 226 and 230)), and he had presented to him the brief *amici curiae* which respondent Rowlings and the attorneys for Stratton filed with the Circuit Court of Appeals in the appeal from the District Judge's decision (R. 68). He obviously drew to a large extent upon his own personal knowledge of the services of counsel to whom he allowed compensation (R. 88).

As was said in *Trustees* v. *Greenough*, 105 U.S. 527, 537:

> "The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. It is not shown in this case by the appellants that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made."

There is nothing in the record of this case to show that the allowances were excessive or that the District Judge abused his discretion in the slightest degree.

The responsibility for seeing that any record contains sufficient evidence to permit a review thereof by an Appellate Court is always on the party appealing. The statement made to the District Court on behalf of the petitioners in opposition to the allowances (R. 85) contains no objection to the manner in which the petitions for allowances were heard nor any request that sworn testimony, affidavits or other evidence be produced. In any case, the record on appeal to the Circuit Court of Appeals does show in considerable detail what the services were for which the allowances were made. For instance, that record included the entire transcript of the proceedings at the trial of the Stratton case and also the brief for *amici curiae* filed by the respondents with the Circuit Court of Appeals at the time of the appeal from the District Court's judgment in the S.E.C. case (see R. 175, 239), although the petitioners apparently did not transmit these documents to this Court as part of their record in this case.

II.

The Decision of the Circuit Court of Appeals is Not in Conflict with Any Decision of Another Circuit Court of Appeals or with Any Decision of This Court.

Although the petitioners set forth five reasons relied on for allowance of the writ, the only one they mention which is covered by Rule 38, 5(b), of this Court, indicating the character of reasons which will be considered for granting such writ, is that the Circuit Court of Appeals "reached a conclusion in conflict with decisions of this Court and of other Circuit Courts" (Petitioners' Brief, 4, par. 4). No

other reason given presents any ground for allowance of the writ. On the other hand, all the other reasons set forth merely describe the alleged particulars wherein the petitioners believe the decision of the Circuit Court of Appeals to be erroneous which falls far short of presenting any ground for the allowance of writ of certiorari.

Furthermore, the petitioners give only lip service to their allegation that the Circuit Court of Appeals reached a conclusion in conflict with decisions of this Court and of other Circuit Courts of Appeals. Nowhere in their brief do they name even one decision which supports this allegation or make even an attempt to explain wherein any conflict exists. Their brief is nothing more than a re-argument of the views they presented to the Circuit Court of Appeals and which they would like this Court to hear again.

It would seem that the petitioners have failed to observe that Rule 38, 5, of this Court explicitly states:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

It is respectfully submitted that no such reasons exist in the case at bar.

Respectfully submitted,

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R. GAYNOR WELLINGS,

Counsel for Respondent Rowlings.

TYLER & REYNOLDS,

Of Counsel.